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For a Court that many thought might prove prone to restraint,[1] the Supreme Court under Chief Justice Burger has proven remarkably activist in sketching the boundaries of separation of church and state. Much of the gloss on the establishment and free exercise clauses of the first amendment[2] is found in the Supreme Court decisions of the seventies, including decisions regarding governmental aid to predominantly church-related private schools. Although the Burger Court, as the Warren Court before it,[3] has struggled to discover a meaningful and cohesive interpretation of the two religion clauses, the doctrinal basis of the Burger Court's decisions seems convoluted.

The role that the framers should play in constitutional decisionmaking is widely debated.[4] Those who seek authority in the framers' opinions find not only that the founders made few presently known utterances about religious freedom when they drafted the religion clauses,[5] but also that the practices of the original states varied too widely to reveal a consensus.[6]

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[1] *See, e.g.*, Duscha, *Chief Justice Burger*, N.Y. Times, Oct. 5, 1969, § 6 (Magazine), at 140, *cited in* Note, *Chief Justice Burger: Whither Now the Supreme Court?*, 15 S.D. L. REV. 41, 63 (1970). *But see* Kurland, *Enter the Burger Court*, 1970 SUP. CT. REV. 1, 91.

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[3] P. KAUPER, RELIGION AND THE CONSTITUTION 50-79 (1964).

[4] *Compare* C. CURTIS, LIONS UNDER THE THRONE 2-3 (1947), *quoted in* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 170-71 (1975), *and* E. LEVI, AN INTRODUCTION TO LEGAL REASONING 59 (1949), *and* Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 528-33 (1964), *with* Katz v. United States, 389 U.S. 347, 373 (1967) (Black, J., dissenting), *and* Graves v. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring), *and* T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 123-24 (8th ed. with additions by W. Carrington 1927) (1st ed. Boston 1868), *and* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 298-301 (4th ed. 1873) (1st ed. Boston 1833).

[5] 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 526 (1950). Indeed, one may conclude that religious liberty is protected through the fifth amendment. Madison wrote that a man "has a property of peculiar value in his religious opinions, and in the possession and practice dictated by them," Madison, *Essay on Property, reprinted in* 6 WRITINGS OF JAMES MADISON 101 (G. Hunt ed. 1906) [hereinafter cited as WRITINGS], and that "[g]overnment is instituted to protect property of every sort. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." *Id.* at 102 (emphasis added). Madison added that governments that guarded possessions, but did not protect citizens in the enjoyment of their opinions, "a more valuable property," *id.*, should be praised sparingly. *Id.* at 101.

[6] Rhode Island, Pennsylvania and Delaware had no state church; New Jersey, New York, North Carolina, Georgia and Virginia discarded theirs; the other states retained state churches. 1 A. STOKES, *supra* note 5, at 526; *see id.* at 164-66, 508.

Consequently, in order to understand the religion clauses,[7] one should consider the writings of James Madison, the father of the Constitution.[8]

Madison's influence on religious thought,[9] as well as on the Constitution, compels resort to his opinions. Many scholars[10] and Supreme Court Justices[11] have interpreted Madison's remarks as intending absolute separation of church and state. Only a minority maintain that he may have been ambiguous about separation.[12] A fuller understanding of Madison's writings reveals that his views on separation were too subtle to be labeled absolutist and too thorough to be labeled ambiguous. Such an understanding comes both from his writings and, in part, from examining the Burger Court's opinions. The Burger Court increasingly and often correctly echoes Madison, as when it bases its concerns about political divisiveness on Madison's faction arguments[13] for separation. Particularly relevant to modern constitutional interpretation, and too rarely considered by the Burger Court, are the purpose of Madison's separation, his assumptions and their continuing validity, and the circumstances that might justify departing from Madison's original plan of separation.[14]

This article examines Madison's view of separation and relates it to his view of government. It considers how these two views depend on two basic Madisonian values, the control of faction and the encouragement of multiple sects. The article next examines the modern Court's interpretation of Madison's writings, highlighting the problems created by an incomplete

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[7] Most of the founders supported religion and believed in religious freedom. *Id.* at 514; *see* THE FEDERAL AND STATE CONSTITUTIONS (F. Thorpe ed. 1909). They likely would have had difficulty legislating comprehensively on religion, however. The brevity of the religion clauses requires interpretation for which Madison's writings are an important source.

[8] *See* E. BURNS, JAMES MADISON 190-91 (1938); M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 197-98 (1913). Gaillard Hunt, editor of the WRITINGS, *supra* note 5, noted that "in theoretical knowledge of government he surpassed all his associates." G. HUNT, THE LIFE OF JAMES MADISON 112-13 (1902).

[9] Madison's MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1784) did more than any other document prior to the first amendment debates to generate the idea of a mutually friendly separation of church and state. 1 A. STOKES, *supra* note 5, at 27. His role in the struggle for religious freedom in Virginia was that of an "exceptionally warm friend of religious freedom." *Id.* at 527-28. For discussion of the complicated issue of church-state separation in Virginia, see H. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA (1910).

[10] *E.g.*, R. KETCHAM, JAMES MADISON 70-80 (1971); Konvitz, *Separation of Church and State: The First Freedom*, 14 LAW & CONTEMP. PROB. 44 (1949).

[11] *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 12 (1947); *id.* at 28-63 (Rutledge, J., dissenting); Reynolds v. United States, 98 U.S. 145 (1878).

[12] *E.g.*, P. KAUPER, *supra* note 3, at 50.

[13] Madison defined a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST No. 10, at 57 (J. Madison) (J. Cooke ed. 1961).

[14] *Cf.* Williams v. Florida, 399 U.S. 78, 122-26 (1970) (Harlan, J., concurring in part & dissenting in part) (history continues to be wellspring of constitutional interpretation, and one should blend history with contemporary problems).

reading of his works. By examining opinions of the Burger Court, the article shows that Madison's faction argument has reappeared as a political divisiveness test, and comes to grips with the values of control of faction and encouragement of sects. Finally, the article concludes that, although the early Burger Court was increasingly willing to sacrifice such other values as free exercise in order to control faction, the Court's most recent decisions turn away from this concern with faction and increasingly encourage multiple sects by upholding aid to sectarian institutions.

## MADISON'S VIEW OF SEPARATION

### *The* Memorial and Remonstrance Against Religious Assessments

Those who label Madison an absolutist on separation can cite considerable evidence,[15] including especially his 1784 *Memorial and Remonstrance Against Religious Assessments*.[16] One can understand neither the *Memorial* nor its relationship to the first amendment and Madison's theory of government, however, unless one understands his thought and the circumstances preceding the *Memorial*.

When a convention met in Williamsburg in 1776 to draft a constitution for Virginia,[17] Madison objected that the language of George Mason's original draft of the Virginia Declaration of Rights[18] might require no more than toleration of dissenters by a state-established church.[19] Madison's substitute language[20] punctuated his aversion to church-state alliance with a natural rights argument that all men are entitled to free exercise of religious belief. The Virginia convention approved Madison's free exercise language.

In 1784 Patrick Henry introduced in the Virginia General Assembly a "Bill Establishing a Provision for Teachers of the Christian Religion" to support Christianity by dividing taxes among the well-established

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[15] As President, Madison vetoed a bill to incorporate the Episcopal Church in the District of Columbia and refused relief for a Baptist church in the Mississippi Territory. 8 WRITINGS, *supra* note 5, at 132-33 (1908). He also refused to provide chaplains in the national councils. *See* 9 *id.* at 100 (1910). *But see* note 21 *infra* (Madison compromised by voting for incorporation of Episcopal Church in Virginia).

[16] 2 WRITINGS, *supra* note 5, at 183 (1901).

[17] Regarding the importance of the Virginia struggle, see 1 A. STOKES, *supra* note 5, at 366.

[18] "[A]ll Men should enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate. . . ." 1 THE PAPERS OF GEORGE MASON 278 (R. Rutland ed. 1970).

[19] *See* R. KETCHAM, *supra* note 10, at 72.

[20] Madison's language declared that "all men are equally entitled to the full and free exercise [of religion and that] no man or class of men ought, on account of religion to be invested with any particular emoluments or privileges." 1 THE PAPERS OF JAMES MADISON 174 (W. Hutchinson & W. Rachel eds. 1962) [hereinafter cited as PAPERS]. For a more detailed discussion of the Declaration of Rights, see 1 A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 290-93 (1974).

denominations.[21] Proponents of assessment argued that an equal contribution by the state would prevent both tyranny by one sect and the gospel's disappearance from portions of the state,[22] and that because religion promoted public virtue, its encouragement was necessary to the strength and stability of the republic.[23] Madison agreed with this latter point, but he and others[24] disagreed over the appropriate means. Although almost all opponents of assessment affirmed the value of religion, they argued that religion would be better served by freedom of conscience and state abstinence than by state assessment.[25] With such opposition as a bulwark, Madison wrote his *Memorial and Remonstrance*, which reveals much about his view of government and its relationship to a healthy society. The *Memorial*, which has been embraced by the modern Court as near the original understanding of the religion clauses in the first amendment,[26] can be placed in perspective by relating it to Madison's treatment elsewhere of both control of faction through separation and the importance of multiplicity of sects and their religious values.

### *The View That a Responsible Government Requires Separation to Control Faction*

Madison viewed the control of faction as the fundamental problem of American political theory[27]—indeed of all constitution makers. He thought the effects of faction could be better controlled by a republic than by a democracy, and better by a large republic than a small one.[28] Extend the sphere, said Madison, and so take in a greater variety of parties and in-

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[21] *See* H. ECKENRODE, *supra* note 9, at 57-58, 74-115; 1 A. STOKES, *supra* note 5, at 384. The text of the bill is printed in Everson v. Board of Educ., 330 U.S. 1, 72-74 (1947) (Rutledge, J., dissenting) (supplemental app.). Almost simultaneously a bill to incorporate the Episcopal Church of Virginia was introduced. The Act of Incorporation passed when Madison voted for it as a move to defeat assessment later.

> [T]he necessity of some sort of incorporation for the purpose of holding and managing the property of the church could not well be denied, nor a more harmless modification now obtained. A negative of the bill too would have doubled the eagerness and the pretexts for a much greater evil, a general Assessment, which, there is good ground to believe was parried by this partial gratification of its warmest votaries.

2 WRITINGS, *supra* note 5, at 113 (1901).

[22] *See* H. ECKENRODE, *supra* note 9, at 57-58.

[23] The original bill of 1779 to establish a state church provided that "[t]he Christian Religion shall in all times coming be deemed and held to be the established Religion of this Commonwealth," and recited as its purpose "the encouragement of Religion and virtue." For this and related language of the bill, see H. ECKENRODE, *supra* note 9, at 58. For a similar view that religion contributes to morality of citizens, see *id.* at 89.

[24] *See* H. ECKENRODE, *supra* note 9, at 74-115.

[25] *See id.* at 89.

[26] *See* Everson v. Board of Educ., 330 U.S. 1, 11-13 (1947); *but see* Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 43 (1949) (describing problems with this interpretation).

[27] THE FEDERALIST No. 10, *supra* note 13, at 59.

[28] *Id.* at 64.

terests, making it unlikely that a majority will form with a common motive to invade the rights of other citizens, or will be able to act on such a motive.[29] In other words, multiplicity inhibits faction.[30]

In Virginia the causes of faction—distinct parties and interests—were present.[31] The *Memorial*'s argument against assessment emphasized the tendency of religious establishment to promote faction and to leave government impotent to combat it.[32] Madison argued not that religion was unimportant, but rather that religious establishment is fundamentally divisive. Moreover, not just alliance of church and state, but also accommodation of church by state, yields uncompromising faction.[33] The Madisonian solution was a multiplicity of religious sects. Although he believed that sects would police each other's and government's morals and avidity,[34] Madison's critical assumption was that multiple sects embodying forebearance, moderation and wisdom would thrive without governmental intervention.[35]

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[29] *Id.*

[30] THE FEDERALIST No. 51, at 351-53 (J. Madison) (J. Cooke ed. 1961).

[31] In Virginia the liberal forces were aligned against the conservatives of the Episcopal Church. *See* 1 A. STOKES, *supra* note 5, at 366-70. In 1784 the conservatives controlled eastern, southern and some central counties, amounting to more than half of the state's representatives. 1 A. HOWARD, *supra* note 20, at 323-27. The 1776 constitution heavily favored the older, eastern counties; such favoritism became more pronounced as time passed and people emigrated westward and resulted in sectional arguments in the early 19th century over constitutional reform. *Id.* This problem was not alien to other states. *See* F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860, at 161-62 (1966).

[32] 2 WRITINGS, *supra* note 5, at 187-90 (1901).

[33] *Id.* at 189-90.

[34] *Id.* at 126-28; *See* R. KETCHAM, *supra* note 10, at 166.

[35] *See* Letter from James Madison to Robert Walsh (Mar. 2, 1818), *reprinted in* 8 WRITINGS, *supra* note 5, at 430-32 (1908). It has been argued that Madison was committed to the proposition that justice is the consequence of the peaceful and continuous conflict among various factions within society. *See* G. BEAM, USUAL POLITICS 14-15 (1970). He considered governmental intervention as likely to result "in a conformity to the creed of the majority and a single sect, if amounting to a majority." *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 561 (3d ser. E. Fleet ed. 1946).

The debates on the first amendment are instructive. Huntington urged that the amendment be worded to secure the "rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all." 1 ANNALS OF CONG. 758 (Gales & Seaton eds. 1789). Madison thought that inserting the word "national" before "religion" would satsify the honorable gentleman. *Id.* Livermore proposed that that would not do; rather, Congress shall make no laws "touching religion, or infringing the rights of conscience." *Id.* at 759. Madison withdrew his motion and Livermore's motion passed 31-20. 1 A. STOKES, *supra* note 5 at 543 n.83. Madison's biographer, Irving Brant, has stated that this amendment "was Madison's further answer in behalf of all the American people to every attempt, no matter how small or innocent it might seem to be, to establish religion by financial or any other means." I. BRANT, JAMES MADISON 353-55 (1948). *See also* 1 A. STOKES, *supra* note 5, at 542-43. But the evidence is again not all that substantial: another Madison watcher has pointed out that Madison may have considered this amendment "useful, not essential." *Id.* at 548. *See also* 5 WRITINGS, *supra* note 5, at 389 (1906); 6 *id.* at 7 (1907). Because of the numerous provisions in the states regarding religion, separation may well have been a method designed to bring a reconciliation to the federal convention. Joseph Story noted that while the establishment clause prevented congressional preference of religion, it was not intended to withdraw the Christian religion from protection by Congress. J. STORY, *supra* note 4, at 603-05. *See also* Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 15 (1949).

Madison's attitude toward separation, therefore, likely depended on his conviction that separation controls faction and indirectly fosters multiplicity of interests. His experience—that religious diversity prevented those inclined to privilege or tyranny from succeeding—confirmed his more general theory that freedom was most secure in the presence of multiple countervailing forces checking the tyrannical impulses of any individual group. Because multiple, moderate rival sects were then at work in America, Madison could argue that a "perfect separation" between government and religion had allowed both to exist with "greater purity" and that any deviation from this "strict principle" ought to be excoriated.[36] Government might intervene only to prevent invasion of one sect's rights by another, and thus to restore balance and to inhibit faction. If changing circumstances have invalidated Madison's views that faction is the fundamental problem of constitution makers and that religious establishment promotes faction, then the present applicability of his separationism requires re-examination, particularly in light of his view that the republic requires religious and moral restraints.

### *The View That Separation Encourages Religion and a Moderate Government*

A healthy republic must not simply limit faction through external controls, but also must develop social and moral restraints on both governors and governed.[37] Although at least one commentator has argued that Madison failed to recognize this requirement,[38] Madison observed that political irresponsibility often accompanied the moral degeneration of a people.[39] He saw no conflict between religious liberty and inculcation of religious values.[40] Distinguishing the province of Caesar from the kingdom of God clarified the duties owed to both, he argued.[41] Moreover, he believed that separation best allowed religious instruction to be diffused throughout the community.[42] Madison's argument for separation, therefore, rests neither on individual conscience as a preferred freedom, nor on the single

[36] Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 9 WRITINGS, *supra* note 5, at 100-02 (1907). On the other hand, there is an estimate that church affiliation at the time of the founding of the republic reached only four percent of the population. *See* Garrison, *History of Anti Catholicism in America*, in SOCIAL ACTION 9 (1948).

[37] *See* K. BOULDING, THE ORGANIZATIONAL REVOLUTION 228 app., at 236-44 (1st ed. 1953).

[38] G. BEAM, *supra* note 35, at 27-29.

[39] Madison, *Report on the Resolutions of 1799, reprinted in* 6 WRITINGS, *supra* note 5, at 352 (1906); 1 PAPERS, *supra* note 20, at 96. *See also* H. COLBOURN, THE LAMP OF EXPERIENCE 50 (1965); R. KETCHAM, *supra* note 10, at 299-300.

[40] Madison thought that religion as an important moral restraint would grow spontaneously, without governmental incentive. Letter from James Madison to Rev. Adams, *reprinted in* 9 WRITINGS, *supra* note 5, at 484 (1910).

[41] *Madison's "Detatched Memoranda,"* 3 *supra* note 35, at 555.

[42] *See id.* at 559.

argument that tyranny is the necessary outcome of governmental involvement, but rather on separation's control of faction and indirect promotion of religious values. History seems largely to have vindicated Madison: the trend to multiplicity has been constant.[43]

Separation, by promoting religious values, also promoted the moderate and limited government Madison thought essential. Separation allowed government flexibility by freeing it from involvement in questions of religious doctrine.[44] The maximum potential of the political sytem could be realized only if political conflicts were solved at the low tension levels attainable only when religion is independent of government.[45] Thus, although it has been observed that the *Federalist* essays provide little encouragement of morality beyond the indirect encouragement of checks and balances,[46] the system requires that individuals live with political ambiguity.[47] Collusion of church and state, however, tends to extinguish ambiguity by encouraging the belief that one can define political rights for all times and circumstances. Moreover, involvement of church with state encourages a view of government as the definer of these and other ultimate propositions. Separation, on the other hand, allows government to disassociate itself from a defense of final philosophical truths.[48]

In sum, Madison regarded separation as a tool. It aided control of faction and fostered multiplicity of sects. Collusion served only to fan the flame of faction, and faction could have no other result than the destruction of multiplicity, the preserver of religious and civil rights. Although Madison saw no possible conflict between controlling faction by separa-

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[43] *See* 1 A. STOKES, *supra* note 5, at 54. Such multiplicity was due largely to the peculiar features of the growth of the United States: the extent of territory, the opening of the frontier, the Civil War, racial strains and the American's natural independence. *Id.* The import of certain of these factors has abated. Nevertheless, in 1940 as many as 256 religious bodies existed in the United States. THE YEARBOOK OF AMERICAN CHURCHES 54 (1940).

[44] Madison was close to Hume and the philosophy of the Enlightenment espousing man's ability to reason, but nevertheless entertained doubts about the people's ability to define ultimate philosophical truths. Collusion of church and state, he thought, encouraged such an attempt to define ultimate truths. D. LUTZ, JAMES MADISON AS A CONFLICT THEORIST 79-97 (1969). *See also* Adair, *"That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth* Federalist, 20 HUNTINGTON LIB. Q. 343 (1957); Adair, *The Tenth Federalist Revisited*, 8 WM. & MARY Q. 48 (3d ser. 1951).

[45] *See* THE FEDERALIST Nos. 46, 53, 63 (J. Madison); 2 WRITINGS, *supra* note 5, at 362 (1901); J. BURNS, THE DEADLOCK OF DEMOCRACY 21-22 (1967); Diamond, *Democracy and the Federalist: A Reconsideration of the Framer's Intent*, 53 AM. POL. SCI. REV. 52-68 (1959).

[46] *E.g.*, Carey, *Federalism: A Defense of Political Process*, in FEDERALISM 48 (V. Earle ed. 1968).

[47] For a more extended discussion of the necessity of ambiguity, see D. LUTZ, JAMES MADISON AS A CONFLICT THEORIST 79-97 (1969). Consider also the connection of Madison and Hume in Adair, *"That Politics May Be Reduced to a Science": David Hume, James Madison and the Tenth* Federalist, 20 HUNTINGTON LIB. Q. 343 (1957), and in Adair, *The Tenth Federalist Revisited*, 8 WM. & MARY Q. 48 (3d ser. 1951). Madison was aware that the definition of what constituted rights adverse to the rights of other citizens or to the permanent and aggregate interests of the community was somewhat vague. G. DIETZE, THE FEDERALIST 274 (1960).

[48] G. DIETZE, *supra* note 47, at 57.

tion and encouraging multiplicity by separation, an overview of his separationism could help one to reconcile the increasing modern conflict between control of faction and preservation of multiplicity. To understand this modern conflict one will also need an understanding of how prior courts have set precedent on the basis of a compartmentalized view of Madison's thought—a view with a wall between his concepts of religion and of government.

## THE MODERN COURT RELIANCE ON MADISON

### *Pre-Burger Court Decisions: 1947-1969*

Either of the two religion clauses, if pushed to the extreme, can violate the other.[49] The modern Court at least arguably has put the free exercise clause above the establishment clause,[50] perhaps in part because of the Court's incomplete understanding of Madison's political philosophy. In fairness to the Court, history did little to force it to understand Madison in depth. Prior to the 1940's, multiple sects with little need for governmental aid pervaded the country, and religious controversies were mostly limited to transcendental matters.[51] In 1940, however, in *Cantwell v. Connecticut*[52] the Court recognized that the fourteenth amendment incorporated the religion clauses of the first amendment.[53]

In *Everson v. Board of Education*[54] Justice Black, in his opinion for a narrowly divided Court, upheld a New Jersey law reimbursing parents of both public and private school pupils for public transportation fares to school. Although the program provided an indirect benefit to religious schools, of greater interest is that the Court articulated an expansive interpretation of the first amendment, with Virginia's history and Madison's intent as support. Recounting the history of religious faction and inequity in colonial Virginia, the Court concluded that "[t]hese practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence."[55] Following Madison, the Court argued that the people's individual religious liberty can be secured best under a neutral government, one which neither supports nor assists religion.[56] From this proposition, Justice Black concluded that New Jersey could not exclude its citizens

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[49] Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

[50] *See* Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1139 (1973). This conflict between the free exercise and the establishment clauses should not be confused with the conflict between preservation of multiplicity and control of faction.

[51] *See* F. LITTELL, FROM STATE CHURCH TO PLURALISM 39-41 (1962).

[52] 310 U.S. 296 (1940).

[53] *Id.* at 303.

[54] 330 U.S. 1 (1947).

[55] *Id.* at 11.

[56] *Id.*

from benefiting from public welfare legislation either because of their "faith or lack of it."[57]

Madison's opposition to establishment and support for separation was designed, however, to control faction, to encourage multiplicity and to clear the way for development of habits of virtue. That he meant to protect individual lack of faith is not at all clear.[58] The Court failed to understand that Madison's separation was a means rather than an end in itself. Justice Black's argument was limited to religion as equivalent to secular conscience. So limiting the argument and overlooking the possible conflict between the free exercise and establishment clauses allows an absolutist separationism to flourish. Because the Court failed to perceive Madison's broader goals, it necessarily failed as well to see that these goals—in a way unforeseen by Madison—were increasingly coming into conflict with each other. Viewing separation as an end in itself, the Court failed to consider whether separation should be redirected to fulfill the Madisonian goals. Regardless of their opinions of the case, both the majority[59] and the dissenters[60] in *Everson* insisted that separation be absolute.

Consequently, the *Everson* Court did not address the possibilities that strict neutrality might result in the demise of parochial education, that even minimal intervention by government to encourage the survival of multiplicity might encourage faction, or that not all forms and degrees of governmental intervention might have the same factious effects. Although Madison argued that no science of government is precise,[61] the Court in *Everson* turned a deaf ear to his advice by ignoring the purposes of separation.

The Court's unwillingness to consider the effects of different degrees and kinds of aid on faction appeared again in *Illinois ex rel. McCollum v. Board of Education.*[62] In *McCollum* the Court invalidated a program of released time religious instruction on school property. To say that appellants were wrong when they argued that the first amendment was intended only to forbid government's preference of one religion over another[63] does not explain why the Court should have allowed *Everson*'s busing to religious instruction but not *McCollum*'s released time for that instruction on school property. A distinction can be made neither by a broad interpretation of the first amendment nor by reference to the

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[57] *Id.* at 16.

[58] *See* 5 WRITINGS, *supra* note 5, at 176 (1904); 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 118-20, 148-49 (2d ed. J. Elliot ed. 1881). Madison did describe separation of church and state as "the great barrier against usurpations on the right of conscience." 1 Madison, LETTERS AND OTHER WRITINGS 251 (P. Fendall ed. 1865).

[59] *See* 330 U.S. at 18.

[60] *See id.* at 24-27 (Jackson, J., dissenting); *id.* at 31-33, 52, 59, 63 (Rutledge, J., dissenting).

[61] THE FEDERALIST No. 37, at 235 (J. Madison) (J. Cooke ed. 1961).

[62] 333 U.S. 203 (1948).

[63] *Id.* at 211.

framers' intent, but only on the basis of which program is more likely to incite faction. Justice Frankfurter's concurrence[64] alone reached this point.

Justice Frankfurter differed from the majority in his willingness to interrelate Madison's concepts of religious freedom, government and society.[65] The majority's argument was that government and religion both could perform best when not interfering with one another.[66] Justice Frankfurter carried this point further. Although he recognized that the individual's right to free exercise of worship together with the duty of public schools to inculcate morality sometimes precludes absolute separation, he echoed Madison when he recognized as well that to allow religious instruction on school grounds tends to promote destructive religious conflicts.[67]

The Warren Court later indirectly encountered the conflict of absolute separation with preservation of multiplicity and religious values. In *Zorach v. Clauson*,[68] the Court upheld a New York education law allowing public schools to release students during school hours for religious instruction away from school grounds. The Court's neutrality became more flexible as the Court argued that the religiousness of the people demands public accommodation of spiritual needs. The Court said that the Constitution did not require the government to show "callous indifference to religious groups."[69] Neutrality, properly conceived, allows for accommodation of religious values and pluralism if there is no overt religious instruction on school grounds,[70] no direct financial help[71] and no forcing of religion.[72] Although, according to Justice Douglas, a just government must be

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[64] "[A]greement, in the abstract, that the First Amendment was designed to erect a 'wall of separation between church and State,' does not preclude a clash of views as to what the wall separates." *Id.* at 213 (Frankfurter, J., concurring). Justice Frankfurter concluded that secular public education was designed to promote cohesion in a heterogeneous society, and therefore must keep "scrupulously free from entanglement in the strife of sects." *Id.* at 216-17.

[65] *See id.* at 214-17.

[66] *Id.* at 212.

[67] *Id.* at 216-17 (Frankfurter, J., concurring). Justice Jackson came close to Madison's faction argument in his concurring opinion:

> To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all school boards of the nation, "to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools," is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes.

*Id.* at 237 (Jackson, J., concurring). *See also* J. MADISON, *Spirit of Government*, in 6 WRITINGS, *supra* note 5, at 93 (1906).

[68] 343 U.S. 306 (1952).

[69] *Id.* at 314.

[70] *See id.* at 308.

[71] *See id.* at 308-09.

[72] *See id.* at 311, 314.

neutral,[73] "[t]he First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State."[74]

The *Zorach* Court thus realized that separation as absolute neutrality may create "hostile, suspicious and even unfriendly"[75] relations between church and state. Absolute neutrality may also inhibit the growth of religious values by preferring "those who believe in no religion over those who do believe."[76] Accommodation, rather than strict neutrality, encourages a multiplicity of religious sects which inculcate moral values. *Zorach*, then, saw neutrality as a tool designed to promote the substantive value of religious heterogeneity in America. Such indirect advancement of religious values does not impermissibly advance religion. This procedural, flexible neutrality is not an end in itself. It is instead evaluated by examining its goals. The *Zorach* Court found minimal aid necessary to preserve religious values. Perhaps without realizing it, the Court implicitly questioned whether separation as absolute neutrality encourages multiplicity.[77] However, the Court did not articulate its move from absolute neutrality to this new kind of neutrality.

After *Zorach* the Warren Court moved back to the position that any aid affronts individual liberty. In *Engel v. Vitale*,[78] the first school prayer decision, Justice Black, writing for the majority, touched only briefly on the potential divisiveness of church-state entanglement.[79] Instead of developing the point, he emphasized that a religious people's traditions require no governmental support.[80] Separation was again identified primarily with preserving individual liberty by avoiding governmental tyranny.[81]

The Court's neglect of divisiveness later worked to its detriment in *Board of Education v. Allen*.[82] *Allen* involved a challenge to a New York statute authorizing public schools to loan textbooks free of charge to students in private schools. Because only those textbooks approved by public school authorities could be lent, the Court upheld a state court's determination that the statute was " 'completely neutral with respect to

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[73] *See id.* at 311, 313-14.

[74] *Id.* at 312. Justice Douglas distinguished *McCollum* from *Zorach* because in the latter the "public schools do no more than accommodate their schedules to a program of outside religious instruction." *Id.* at 315.

[75] *Id.* at 312.

[76] *Id.* at 314.

[77] *See id.* at 318-20 (Black, J., dissenting); *id.* at 325 (Jackson, J., dissenting).

[78] 370 U.S. 421 (1962).

[79] *Id.* at 431.

[80] *Id.* at 435.

[81] *Id.* at 432-33. This perspective continued in Abington School Dist. v. Schempp, 374 U.S. 203 (1963). The Court said that "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' " *Id.* at 225.

[82] 392 U.S. 236 (1968).

religion.' "[83] The Court implied that multiplicity, here of parochial schools and their high-quality education, is an important value.[84] Again, neutrality was treated not as total abstention, but rather as permitting those programs that benefit all by preserving multiplicity. The Court gave no reason for its shift from absolute separation to requiring only procedural neutrality and a secular purpose. Although neutrality was mentioned,[85] the majority made little attempt to relate it to multiplicity, and made no attempt to determine how such aid as textbook loans affects factiousness.

Justice Harlan considered faction in his concurrence, however.[86] Although he agreed that neutrality was not absolute, Justice Harlan recognized that neutrality is "a coat of many colors."[87] He observed:

> I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly and directly in the realm of the sectarian as to give rise to . . . *divisive influences and inhibitions of freedom*," it is not forbidden by the religious clauses of the First Amendment.[88]

Before the appointment of Chief Justice Burger, the Court generally treated separationism as an end in itself and almost never judged neutrality by its consequences of limiting faction and preserving multiple sects.[89] The Court limited separationism, in the name of free exercise, only when multiplicity was threatened. Then, if the challenged aid did not offend the establishment clause, it was allowed to stand without discussion of its possible divisiveness.

### *The Burger Court*

#### Benevolent Neutrality and the Divisiveness Test

The Burger Court began to address the conflict between the Madisonian values of control of faction and promotion of multiplicity. The early Burger Court, like the Warren Court, found much value in multiplicity. In *Walz*

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[83] *Id.* at 241 (quoting Board of Educ. v. Allen, 20 N.Y.2d 109, 117, 228 N.E.2d 791, 794, 281 N.Y.S.2d 799, 805 (1967)).

[84] *See* 392 U.S. at 247-48 & n.9.

[85] *E.g., id.* at 241.

[86] *See id.* at 249 (Harlan, J., concurring).

[87] *Id.*

[88] *Id.* (citation omitted) (emphasis added).

[89] The notable exceptions were: Engel v. Vitale, 370 U.S. 421, 437 (1962) (Douglas, J., concurring); Zorach v. Clauson, 343 U.S. 306 (1952); *id.* at 315 (Black, J., dissenting); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1947) (Frankfurter, J., concurring); *id.* at 232 (Jackson, J., concurring). Justice Black's argument in his *Zorach* dissent for absolute separation as the only barrier to injecting "political and party prejudices into a holy field," 343 U.S. at 320, is distinctly Madisonian.

*v. Tax Commission*,[90] Chief Justice Burger, writing for the Court, coined the term "benevolent neutrality."[91] Holding that the New York City Tax Commission could grant property tax exemptions to religious organizations for property used solely for religious worship, the Court found constitutional neutrality broad enough to permit such state accommodation of free exercise of religion.[92] Indeed, the Chief Justice argued, the attenuated involvement of tax exemption not only encouraged multiplicity, but avoided excessive entanglement as well.[93] Because Chief Justice Burger observed that the "tendency of a principle [is] to expand itself to the limit of its logic,"[94] the Court adopted an organic, rather than a philosophic, view of neutrality: a just government may be neutral, but its neutrality demands a vigilance not required by a logical principle.[95]

Chief Justice Burger's *Walz* argument is important for its development of the factious potential of absolute separationism. Expanding the argument that Justice Douglas refused in *Zorach v. Clauson*,[96] Chief Justice Burger argued that some governmental involvement may avoid the excessive involvement that absolute separation might entail.[97] Thus, the Chief Justice observed that "[i]n analyzing either alternative [taxing or exempting churches], the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."[98] No longer was the establishment clause construed as absolutely neutral toward religion; it was now neutral only in avoiding preference for particular religious sects.

Although avoidance of faction and promotion of multiplicity were preserved by the minimal involvement of tax exemption, the *Walz* Court warned that faction might emerge in other promotions of multiplicity.[99] Justice Brennan, concurring, argued that although religious institutions contribute to

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[90] 397 U.S. 664 (1970).

[91] *Id.* at 669.

[92] *See id.* at 669, 673. Chief Justice Burger's reasoning accords with Madison's argument that "[n]o Government is perhaps reducible to a sole principle of operation. Where the theory approaches nearest to this character, different and often heterogeneous principles mingle their influence in the administration." J. MADISON, *Spirit of Governments*, in 6 WRITINGS, *supra* note 5, at 93 (1906).

[93] 397 U.S. at 678.

[94] *Id.* at 678-79 (quoting B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921)). *Cf.* Abington School Dist. v. Schempp, 374 U.S. 203, 217 (1963) (suggesting that because Supreme Court was consistent, those criticizing its logic were engaged in mere "academic exercises").

[95] *See* 397 U.S. at 669-70. Chief Justice Burger apparently attempted to avoid contributing to faction by observing that New York included churches within a group which also included hospitals, libraries, and historical and patriotic groups. *Id.* at 672-73. He explained that "[t]he State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life," *id.* at 673, and as groups which foster the community's " 'moral or mental improvement,' " *id.* at 672.

[96] 343 U.S. 306 (1952).

[97] 397 U.S. at 674-75.

[98] *Id.* at 675.

[99] *Id.* at 674-75.

the development of the community and to pluralism, benevolent neutrality must stop before it becomes too involved with religion.[100] His reasoning was echoed by Justice Harlan, who seemed to warn that if even minimal involvement, although aiding pluralism, aids faction as well, the Court will stop it: "It is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in the trail ahead. I, for one, however, do not believe that a 'slippery slope' is necessarily without constitutional toehold."[101]

Unlike the Warren Court in *Allen*, then, the Burger Court seemed willing to weigh values. Using neutrality as its guide, the Court explored what is lost through absolute separationism and found that strict separation not only inhibits multiplicity but also may encourage faction. In contrast, benevolent neutrality allowed the Court to satisfy both its goals in *Walz*—encouragement of multiplicity and limitation of faction.

Benevolent neutrality proved less than a panacea in subsequent cases, however. In *Lemon v. Kurtzman*[102] the Court considered district court judgments in challenges to Rhode Island and Pennsylvania statutes. While the Rhode Island act, which provided for a fifteen percent salary supplement to private school teachers, had been invalidated below,[103] the Pennsylvania act, which authorized "purchasing" certain secular educational services from private schools, had been sustained.[104] The Court noted that in both programs, reimbursement was restricted to courses in secular subjects that used approved textbooks and materials.[105]

The Court held both programs invalid, primarily because of the dangers of entanglement.[106] Although Chief Justice Burger, writing for the Court, was aware of the value of multiple sects,[107] he was unwilling to authorize a program that would require "[a] comprehensive, discriminating, and continuing state surveillance."[108] Compared with the Warren Court, the Burger Court was relatively unconcerned about whether a program advanced

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[100] *Id.* at 689-90 (Brennan, J., concurring). One could extend the argument to support governmental subsidies for moral improvement. Justice Brennan contended, however, that benevolent neutrality must be balanced with the value of separation. For a more extensive argument, see Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1687 n.16 (1969) ("The symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church."). *But cf.* Walz v. Tax Comm'n, 397 U.S. at 704 (Douglas, J., dissenting) (the *Walz* facts represent a direct subsidy).

[101] 397 U.S. at 699-700 (Harlan, J., concurring).

[102] 403 U.S. 602 (1971).

[103] DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970), *aff'd sub nom.* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[104] Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969), *rev'd*, 403 U.S. 602 (1971).

[105] 403 U.S. at 619, 621.

[106] *Id.* at 615.

[107] *E.g., id.* at 623, 625.

[108] *Id.* at 619.

religion. According to the Burger Court, the issue was the governmental intervention required by the program. The Court concluded that subsidies differ from textbook loans not because they involve more direct aid to religion, but because they require more surveillance.[109] In *Lemon* preservation of multiplicity was less compelling than the threat of entanglement or faction.

Moreover, the Court in *Lemon* took a long-range view of the divisiveness of the challenged programs. It noted particularly that because of the high attendance at church-related schools in Pennsylvania and Rhode Island, upholding the statutes might produce a coalition of political and religious groups[110]—in short, a faction. Responding to this threat, the Court expanded its entanglement test to include consideration of the probability that a program would arouse intense feelings in the community and generate inflated demands for aid.[111] Chief Justice Burger urged that the Court beware the constitutional momentum developed by the validation of certain programs,[112] thus echoing Justice Black's dissent in *Board of Education v. Allen*.[113] Although Chief Justice Burger admitted the importance of multiplicity in American life[114] and recognized the financial plight of parochial schools,[115] he noted that the current practice places the burden for supporting such multiplicity primarily on "faithful adherents."[116]

In retrospect, the disposition in *Lemon* appears based on two broad assertions: first, that "political fragmentation and division along religious lines [was] one of the principal evils"[117] against which the first amendment was directed,[118] and second, that even potential divisiveness threatened the normal political process by diverting people from other important issues.[119] The Court in *Lemon*, although willing to invoke benevolent neutrality to preserve pluralistic influences, was the first Court explicitly to recognize that governmental involvement, even though neutral, might still encourage faction. It was the first Court as well to perceive that absolute separation

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[109] *Id.* at 616-17, 619, 621.

[110] *Id.* at 622. The Court also observed that "[t]he potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." *Id.* at 623.

[111] *Id.* at 622.

[112] *Id.* at 624-25.

[113] 392 U.S. 236, 253 (1968) (Black, J., dissenting).

[114] *See* 403 U.S. at 625.

[115] *Id.*

[116] *Id.*

[117] Meek v. Pittenger, 421 U.S. 349, 372 (quoted in Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 104, 109 (1975).

[118] 403 U.S. at 622. Many commentators think that this concern over divisiveness affronts free speech. *See, e.g.*, Lewin, *Disentangling Myth from Reality*, 3 J.L. & EDUC. 107, 111 (1974); Monaghan, *supra* note 117, at 109-10; Valente & Stanmeyer, *Public Aid to Parochial Schools—A Reply to Professor Freund*, 59 GEO. L.J. 59, 68-69 (1970).

[119] 403 U.S. at 622-23.

might not allow pluralistic influences to survive. But most important, it was the first Court to recognize that the same involvement that encourages multiplicity might also encourage faction.

### Divisiveness in Context

When preservation of multiplicity and discouragement of entanglement and faction collided in challenged programs, the early Burger Court seemed to place prevention of entanglement first in its priorities. Moreover, beginning with *Tilton v. Richardson*[120] and *Committee for Public Education & Religious Liberty v. Nyquist*,[121] the Court increasingly evaluated the potential for factiousness in the particular "communities" involved. Thus, in *Tilton* the Court upheld federal construction grants to four church-related colleges and universities in Connecticut. Aware of Justice White's warning in *Lemon* that without federal funding some institutions might have to close their doors,[122] the plurality in *Tilton* upheld the grants with the doctrine of benevolent neutrality. Although Chief Justice Burger, writing for the plurality, argued that three factors in the programs, considered together, sufficed to control the outcome of the case,[123] he also distinguished the institutions and communities involved in *Tilton*—colleges and universities—from those in *Lemon*—elementary and secondary schools.[124] He observed that the appellants did not point "to any continuing religious aggravation on this matter in the political processes. Possibly this can be explained by the character and diversity of the recipient colleges and universities and the absence of any intimate continuing relationship or dependency between government and religiously affiliated institutions."[125]

In *Nyquist* the character and diversity of the community were even more important. New York's education and tax law amendments had established three financial aid programs for private elementary and secondary schools, based in part on legislative findings that the right to select among alternative educational systems should be available in a pluralistic society and that the fiscal crisis in nonpublic education had caused a diminution of facilities in low-income urban areas.[126] The Court held all provisions unconstitutional. Justice Powell, writing for the Court, found that the effect of both programs was to advance the religious mission of the recipient sectarian schools.[127] But he went further. Whereas the tax exemption challeng-

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[120] 403 U.S. 672 (1971) (plurality opinion).
[121] 413 U.S. 756 (1973).
[122] 403 U.S. at 664 (White, J., concurring in part & dissenting in part).
[123] 403 U.S. at 687-88 (plurality opinion). The factors were lack of religious indoctrination as a purpose of the colleges and universities, "the nonideological character of the aid" and the "one-time, single-purpose [nature of the] construction grant." *Id.*
[124] *Id.* at 688-89.
[125] *Id.* at 688.
[126] 413 U.S. at 763-67.
[127] *See id.* at 794.

ed in *Walz* applied to all religious, educational or charitable groups, the recipients in *Nyquist* were a much narrower class than that exempted from property taxation in *Walz*.[128] Not only would the *Nyquist* plan require continuing state surveillance, but "assistance of the sort here involved carries grave potential for the entanglement in the broader sense of continuing political strife over aid to religion."[129] Here, entanglement was extended to include that which results when shifting majorities are replaced by permanent ones.[130] Entanglement both causes political divisions along religious lines and results from those divisions as people become aware of them and either challenge or seek to exploit them.[131] Justice Powell rejected the New York statute not merely because of its continuing appropriations, but also because the proposed aid program would "become entrenched, . . . and generate [its] own aggressive constituencies," thereby resulting in political division.[132] He hinted that he would not increase the tendency toward faction, even if avoiding the tendency required withholding aid to faltering sects.[133] His concern raises a central Madisonian problem: the consequences of a view of government as provider. Government not only loses apparent legitimacy when it fails to meet demands, but also contributes to the formation of impatient, immoderate and avaricious majorities when it encourages its constituents to plead all grievances before it. Justice Powell thus spoke directly to the potential conflict between encouragement of multiple sects and control of faction. He did not explain, however, why textbook loans never "in part have the effect of advancing religion,"[134] an effect that invalidated the expiration after twenty years of the restriction in *Tilton* requiring the use of the government-subsidized buildings for nonreligious purposes.[135] Although religious values and multiplicity may follow "the best of our traditions"[136] and discourage faction, the extent to which the state may intercede to ensure that multiplicity is unclear.

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[128] *Id.*

[129] *Id.*

[130] *See id.* at 797.

[131] *See id.; cf.* Lemon v. Kurtzman, 403 U.S. 602, 645-46 (1971) (Brennan, J., concurring in part & dissenting in part) (recounting 18th & 19th century New York experience in which Methodist, Presbyterian, and Jewish schools requested funds which Catholic schools had been given earlier).

[132] 413 U.S. at 797; *See id.* at 794-98; *cf.* THE FEDERALIST No. 42, at 283 (J. Madison) (J. Cooke ed. 1961) ("But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamours of an impatient avidity for immediate and immoderate gain.").

[133] *See* 413 U.S. at 788-89. The meaning of multiplicity may have grown more complicated by coming to include not only determination of number of sects, but also consideration of whether a religion views parochial education as fundamental. To give no aid would not mean the demise of sects, but pluralism in religious education might atrophy.

[134] Tilton v. Richardson, 403 U.S. at 683 (plurality opinion).

[135] *Id.*

[136] Zorach v. Clauson, 343 U.S. at 314; *see* A. STOKES, *supra* note 5, at 538 n.135; Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROB. 61, 71 (1949).

*Meek v. Pittenger*[137] illustrates the elusiveness of the Burger Court's criteria for resolving potential conflicts between the Madisonian goals. Pennsylvania authorized providing pupils in private elementary and secondary schools such auxiliary services as speech and hearing therapy and assistance for educationally exceptional or disadvantaged students, and authorized loans of textbooks.[138] The state also authorized loaning instructional materials and equipment to private schools.[139] The Supreme Court invalidated all provisions of the act except the textbook loan program. The Justices differed, however, over the part that the entanglement or divisiveness test should play in *Meek*. Justices Brennan, Douglas and Marshall dissented in part on the ground that because the textbook loans were as divisive as the other programs, the whole should have been invalidated.[140] Justices Burger, Rehnquist and White dissented in part because, *inter alia*, all programs were sufficiently nonentangling and therefore should have been sustained.[141]

If the Court is willing to attribute an element of cooperation to the nonestablishment and free exercise clauses, it will be unable to answer the claim that the wall of separation is an obsolete metaphor.[142] A way for the Court to extricate itself from its dilemma is to evaluate whether a program, no matter how valuable, would too strongly tend to create inflated appetites and increase faction by contributing to the creation of ever more aggressive religious constituencies.

## The Emerging Conflict

The early Burger Court cases reveal that Madison's goals of controlling faction and encouraging multiplicity of sects have begun, by the modern

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[137] 421 U.S. 349 (1975).

[138] *Id.* at 352-54.

[139] *Id.* at 354.

[140] *Id.* at 373-85 (Brennan, J., concurring in part & dissenting in part). One might conclude from Professor Freund's analysis that conflicts over textbooks do not differ substantially from those over choice of teachers. *See generally* Freund, *supra* note 100, at 1683. For a response to Professor Freund, see Valente & Stanmeyer, *supra* note 118. *See also* Lemon v. Kurtzman, 403 U.S. at 635-36 (Douglas, J., concurring); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 798 (Burger, C.J., concurring in part & dissenting in part). If the distinction between texts and other programs is not valid, this invalidity might lead one to conclude that neither form of aid should be upheld. *But see Meek*, 421 U.S. at 385 (Burger, C.J., concurring in part & dissenting in part).

[141] 421 U.S. at 385 (Burger, C.J., concurring in part & dissenting in part); *Id.* at 387 (Rehnquist, J., joined by White, J., concurring in part & dissenting in part). The Chief Justice argued that the Court "turns the Religion Clauses on their heads," *id.* at 387 (Burger, C.J., concurring in part & dissenting in part), by finding unconstitutional the state's providing services, for example, to handicapped students only because they attend a church-related school. *Id.* at 386-87 (Burger, C.J., concurring in part & dissenting in part).

[142] *See* Stanmeyer, *Free Exercise and the Wall: The Obsolescence of a Metaphor*, 37 GEO. WASH. L. REV. 243 (1968).

era at least, to conflict with each other. No longer do all sects seem capable of thriving without governmental aid. Consequently, the Court has validated some forms of aid—particularly and consistently loans of texts directly to students—while seemingly ignoring the factious potential of such aid. Three of the Burger Court's more recent opinions illustrate what may be a trend in the Court toward ignoring its own divisiveness test.

In *Roemer v. Board of Public Works*[143] the challenged statute authorized annual fiscal-year subsidies to private institutions of higher learning, provided they met minimum state requirements, awarded more than merely theological degrees and used the subsidy only for secular purposes.[144] Although Justice Blackmun, writing for plurality, argued that the Court faithfully must apply the principles governing public aid to church schools,[145] the plurality opinion distinguished the earlier entanglement opinions in *Lemon v. Kurtzman* and *Tilton v. Richardson*. The plurality in *Tilton* had agreed with the recognition in *Lemon* that continuing financial relationships, annual audits or governmental analysis of an institution's expenditures would necessarily involve church and state in continuing struggles over financial aid.[146] The plurality in *Roemer*, however, insisted that faction there would not occur because the secular and sectarian activities of colleges are so easily separated[147] and because the occasional state audits would be " 'quick and non-judgmental.' "[148] Some readers of the case may not believe that the plurality adequately explained how it came to such a conviction and how such grants could avoid encouraging divisive demands for increasing aid to religious groups.[149]

That the dispute in *Wolman v. Walter*[150] arose further illustrates that the Court's vacillation encourages states to seek new ways to aid church-related schools.[151] The challenged Ohio statute authorized the state to provide private school pupils with books, instructional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic and remedial services, and field trips.[152] The Court again upheld the provision

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[143] 426 U.S. 736 (1976).

[144] *Id.* at 740.

[145] *Id.* at 754.

[146] *See id.* at 688 (these characteristics not present in *Tilton*).

[147] 426 U.S. at 764, 766-67. The concurring opinion apparently agreed. *See id.* at 769-70 (White, J., concurring).

[148] *Id.* at 764 (plurality opinion) (quoting Roemer v. Board of Pub. Works, 387 F. Supp. 1282, 1296 (D. Md. 1974)).

[149] In his dissent, 426 U.S. at 770-71 (Brennan, J., dissenting). Justice Brennan referred to his concurring opinion in *Abington*, in which he said that general subsidies "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent." Abington School Dist. v. Schempp, 374 U.S. 203, 236 (1963) (Brennan, J., concurring). Justice Brennan was worried in part about secularization of a creed. 426 U.S. at 772.

[150] 433 U.S. 229 (1977).

[151] *Id.* at 266 (Stevens, J., concurring in part & dissenting in part).

[152] *Id.* at 233 (majority opinion).

of textbooks, and upheld provision of standardized testing and scoring, diagnostic services, and therapeutic and remedial services, but ruled unconstitutional the provision of instructional materials and services and field trips.[153]

The Court's reasoning with regard to instructional materials and equipment shows its continuing willingness to uphold at any cost such other forms of aid as textbooks. Ohio previously had lent material and equipment directly to private schools.[154] After such loans were invalidated by *Meek v. Pittenger*, the legislature decided to channel the goods through the pupils. The Court held that despite this technical change, the program was essentially the same, and that because of the impossibility of separating the secular and sectarian educational function of loans of equipment, the loans in part impermissibly aided religion.[155] How can the Court persuasively distinguish loans of textbooks from loans of instructional materials and equipment? The answer is that it cannot; it simply ignores the inconsistency and chooses in the textbook loan context to encourage multiplicity. Such inconsistency not only encourages states to try new forms of aid, but also supplies ripe fields in which dissenters sow their seeds. Justice Marshall's *Wolman* opinion[156] pointed out the tension[157] between *Allen* and *Meek* and argued that to contrast a loan to students with a loan to schools is to make a false distinction.[158] His discussion of entanglement[159] is of particular interest here. For the first time, a Justice recognized that textbook loans are substantial aid: "This danger [of entanglement] exists whether the appropriations are made to fund textbooks, other instructional supplies, or, as in *Lemon*, teachers' salaries."[160] Justice Marshall therefore urged the Court to overrule *Allen* and to draw a line of separation that allows only general welfare programs.[161]

The Court's unwillingness to consider the conflict between control of faction and encouragement of multiplicity continued in *Committee for Public Education & Religious Liberty v. Regan*.[162] After the invalidation of the previous statute,[163] which had appropriated public funds to reimburse church-sponsored and secular private schools for various services,[164] the New York legislature enacted a new bill directing payment to private

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[153] *Id.* at 255.
[154] *Id.* & n.1.
[155] 433 U.S. at 250 (majority opinion).
[156] *Id.* at 256-62 (Marshall, J., concurring in part & dissenting in part).
[157] *Id.* at 257 (Marshall, J., concurring in part & dissenting in part).
[158] *Id.* at 257-58 (Marshall, J., concurring in part & dissenting in part).
[159] *Id.* at 258-59 (Marshall, J., concurring in part & dissenting in part).
[160] *Id.* at 258 (Marshall, J., concurring in part & dissenting in part).
[161] *Id.* (Marshall, J., concurring in part & dissenting in part).
[162] 444 U.S. 646 (1980).
[163] Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).
[164] 444 U.S. at 648.

schools of the costs incurred in compliance with the state requirements of pupil evaluation, reporting and recordkeeping.[165] The new statute also provided for state auditing to ensure that only actual costs incurred would be reimbursed from state funds.[166] The Court denied any inconsistency between *Meek* and *Wolman*, maintaining that it had never " 'accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.' "[167] The Court rejected the entanglement argument, stating that because the issue was not annual appropriations, but only reimbursement for actual costs, there was no reason to think that religious battles might be provoked.[168] In thus upholding the *Regan* reimbursement program, the Court failed to consider adequately how support of multiplicity may encourage faction.

Justice Blackmun, dissenting, argued that the infirmity of such programs is their direct cash payments.[169] He reasoned that such aid would create increasing demands for other forms of aid on the part of religious groups and that entanglement would be fostered by the state's need to ensure that grading not be unduly subjective, that exam questions not be used to inculcate religion and that sectarian employees be reimbursed only for secular functions performed.[170] The majority again ignored the potential of governmental aid for entanglement.

## CONCLUSION

To clarify its confusing line of church-state decisions, the Supreme Court should consider fully the views of James Madison, the father of the Constitution. In doing so, it must erect no wall between Madison's related ideas on religion and government, and must recognize, as it already does occasionally, the increasing conflict between Madison's goals of controlling faction and promoting religious multiplicity. It must also remember the primacy in the Madisonian scheme of avoiding faction.[171]

The early Burger Court advanced beyond its predecessors by partially dismantling their wall between Madison's religious and political ideas. It recognized that church-state separation is a means rather than an end in itself. The Burger Court's sophisticated and correct reasoning in *Walz* was later elaborated into an entanglement test that echoes Madison's concern about religious factions. After a period in which its principal concern was

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[165] *Id.* at 650-52.
[166] *Id.* at 652.
[167] *Id.* at 658 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).
[168] *Id.* at 661 n.8.
[169] *Id.* at 665-69 (Blackmun, J., dissenting).
[170] *Id.* at 669-70 (Blackmun, J., dissenting).
[171] *See* text accompanying note 27 *supra*.

faction, however, the Burger Court has increasingly upheld state efforts to foster religious multiplicity. Although dissenters have pointed out its inconsistency, the Court not only has been unwilling to reverse, under its own entanglement test, the precedent allowing textbook loans, but also has extended that precedent's logic to other potentially factious programs. The Court must look to Madison for the principles with which to expand its entanglement test and to clarify the bearing of entanglement on the validity of programs designed to aid religious multiplicity.

The Burger Court has proven willing and able to dismantle partially the wall between Madison's concepts of religion and government. It has, in one case or another, recognized both of Madison's goals. In its recent neglect of the modern conflict between those goals, however, it has begun to replace bricks once removed by forgetting the primacy of controlling faction. One hopes those bricks will be removed again before the mortar sets.